



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 04 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent disclosure of unwaranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. A copy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had a bachelor's degree as required on the Form ETA 750, and that the beneficiary was therefore not a member of the professional field of the intended employment. The director therefore denied the petition.

On appeal, counsel states that the beneficiary has education in India and work experience, including university teaching experience, which establish that he is a member of the professional field of the intended employment.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). In this instance, it is November 30, 2000.

The Form ETA 750 indicates that the position of software engineer requires a bachelor's degree in "Computer Science, Mathematics, Physics or Electrical, Electronic, Mechanical or Other Related Engineering Field." The copy of the Form ETA 750B attached to the ETA 750 is for a different beneficiary, but a second Form ETA 750B in the original is attached for the present beneficiary, signed by the present beneficiary. In his cover letter counsel states that the petition is for a substituted beneficiary.

On the I-140 petition as originally submitted, in Part 2, petition type, the petitioner checked block "d," for a member of the professions holding an advanced degree or an alien of exceptional ability who is not seeking a national interest waiver.

In support of the petition, the petitioner submitted a copy of a memorandum dated March 7, 1996 by Louis Crocetti, INS Associate Commissioner on substitution of beneficiaries; a copy of a memorandum dated March 22, 1996 by [REDACTED] Administrator, Department of Labor Office of Regional Management on substitution of beneficiaries; a copy of an undated letter from the petitioner's president confirming a job offer to the beneficiary; copies of the first two pages for each year of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 1998, 1999, 2000 and 2001; an undated copy of the beneficiary's resume; a copy of an I-797 approval notice dated January 24, 2001 for an I-129 petition filed by the petitioner on behalf of the beneficiary; a copy of an I-94 card for the beneficiary showing an entry into the United States on July 13, 2000; and copies of certain pages of the beneficiary's Republic of India passport.

The director found that the evidence submitted was insufficient to establish that the beneficiary had an advanced degree and also was insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Therefore, the director issued a request for evidence (RFE) dated September 9, 2002, requesting evidence on each of those issues. In the RFE the director also noted that the record did not contain the original Form ETA 750 and that

the petitioner had informed CIS that the original certified labor petition had been lost during the process of mailing and had asked CIS to request a duplicate from the Department of Labor. The director stated,

Please be advised that [CIS] bears responsibility only for those original labor certifications that have been submitted with an I-140 petition and lost AFTER the petition has been properly filed with [CIS]. Therefore, it will be necessary for the petitioner to begin the labor certification process again with the U.S. Department of Labor to obtain a new, certified labor certification.

(RFE, Sept. 9, 2002, at 2).

In response to the RFE, counsel submitted a letter requesting reclassification of the petition from one for an advanced degree professional to one for a skilled worker, and submitted a revised I-140 petition on which in Part 2, petition type, the petitioner had checked block "e," for a skilled worker requiring at least two years of specialized training or experience, or a professional. The petitioner also provided additional photocopies of the Form ETA 750 and of the substituted beneficiary's Form ETA 750B; a copy of an educational evaluation for the beneficiary dated January 21, 2000 from Multinational Education and Information Services, Inc.; an additional undated copy of the beneficiary's resume; a copy of the beneficiary's bachelor's degree in commerce dated February 14, 1981 from Sri Venkateswara University, Tirupati, India, with attached transcript; a copy of the beneficiary's master's degree in commerce dated August 1983 from Sri Venkateswara University, with attached transcript; a copy of a certificate of proficiency in Oracle software dated December 16, 1999 from Aptech Computer Education, Mumbai, India; copies of letters dated July 9, 1998 and January 3, 2000 from two former employers of the beneficiary; an affidavit of work experience dated November 22, 2002 from the beneficiary; and complete copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 1999, 2000 and 2001.

In a second RFE dated January 24, 2002 the director, noting that the beneficiary's ETA 750B states that he has been employed by the petitioner from February 2001 to the present, requested Internal Revenue Service computer printouts showing the beneficiary's W-2 or Forms 1099 for the years 2001 and 2002.

The director also noted that CIS records indicated approximately 100 petitions filed by the petitioner between 1999 and 2002 for software engineering positions, but that on the I-140 petition the petitioner claimed to have only 30 current employees. The director also requested an explanation of the noted discrepancies. Finally, the director requested payroll information of the petitioner for 2000, 2001 and 2002.

In response, counsel submitted a letter dated April 1, 2003 and the following evidence: a letter dated April 1, 2003 from the petitioner's president; an IRS transcript of the beneficiary's Form W-2 Wage and Tax Statement for 2001; a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002; a copy of the beneficiary's Form 1040A U.S. Individual Income Tax Return for 2002; pay statements for the beneficiary from the petitioner for the months of January, February and March, 2003; and copies of the petitioner's Form W-3 transmittals of wage and tax statements for 2000, 2001 and 2002.

In a decision dated April 22, 2003, the director determined that the petitioner had not established that the beneficiary had the education required by the Form ETA 750, namely, a bachelor's degree in one of the fields listed on that form, and that therefore the beneficiary was not a member of the professional field of the intended employment. The director therefore denied the petition.

On appeal, counsel submits a brief and additional copies of documents previously submitted for the record pertaining to the beneficiary's education and work experience.

On appeal, counsel states that the beneficiary possesses a three-year baccalaureate degree in commerce, a two-years masters degree in commerce, and a one-year certificate course in Oracle software programming, and that the beneficiary has more than seven years of progressive experience, including teaching software applications at a university in India at the undergraduate level. Counsel also states that an educational evaluation in the record finds that the beneficiary has the equivalent of a bachelor's degree in business and computer science and of one year of graduate studies in business.

Since no new evidence was submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The Form ETA 750 states in block 14 that the minimum degree requirement for the offered position is a bachelor's degree in "Computer Science, Mathematics, Physics or Electrical, Electronic, Mechanical or Other Related Engineering Field." Block 15 of the ETA, for Other Special Requirements, states, "Experience in Java, C++, Windows, Oracle, or QA testing. Willing to travel."

The record indicates that the beneficiary holds a bachelor's degree in commerce granted February 14, 1981 from Sri Venkateswara University, Tirupati, India; a master's degree in commerce granted August 1983 from Sri Venkateswara University; and certificate of proficiency in Oracle software issued December 16, 1999 from [REDACTED], Mumbai, India. The record also indicates that the beneficiary has experience from June 1994 to August 1996 as a college lecturer in India in management sciences, which included teaching software programming, and experience as a software programmer with two companies in India from Sept 1996 to Jan 2000.

The educational evaluation dated January 21, 2000 by Multinational Education and Information Services, Inc. states in part:

In summary, [the beneficiary] has a Bachelor degree in Commerce, Master degree in Commerce, certificate in Oracle, and over three years of extensive training and experience in software engineering, system analysis, and computer program design and development. His education background and professional experience are equivalent to an individual with a Bachelor degree in Business & Computer Science and one year of graduate studies in Business from an accredited University in the United States.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

In calculating the equivalent education from the beneficiary's experience, the educational evaluation states, "U.S. Immigration Law and Regulations allows [sic] 3 years of experience = 1 year of university-level credits." Nonetheless, although that formula is applicable to nonimmigrant petitions, it is not applicable to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

In the revised I-140 petition submitted in response to the first RFE, in Part 2, petition type, the petitioner checked block "e," for a skilled worker requiring at least two years of specialized training or experience, or a professional.

That preference category does not distinguish between skilled workers and professionals, for a single check box applies both to skilled workers and to professionals. Nonetheless, even if the instant petition is considered as a petition for a skilled worker, the requirements as stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part,

Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore even if the petition were assumed to be for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree, but the petitioner chose not to do so.

The educational evaluation in the record does not find that the beneficiary holds a foreign equivalent degree. Rather, as noted above, the evaluation relies on a combination of the beneficiary's education and employment experience in finding that the beneficiary has the equivalent of a United States bachelor's degree.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in blocks #14 and #15 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree on November 30, 2000 or a foreign equivalent degree.

In his decision, the director correctly summarized the evidence on the beneficiary's education and work experience. The director correctly noted that although the beneficiary qualified as a nonimmigrant temporary worker in a specialty occupation, the regulation under which he apparently qualified for that category, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), allows for the equivalence to a bachelor's degree to be established through a combination of education and experience, but that regulation does not provide for such a degree equivalency in an immigrant petition. The director also correctly found that a three-year Indian degree is not equivalent to a United States four-year bachelor's degree. The director concluded by finding that the beneficiary is not a member of the professional field of the intended employment, and denied the petition.

The director failed to consider whether the petition might be evaluated as one for a skilled worker, since the petition type checked on the revised petition was block "e," which applies both to skilled workers and to professionals. Yet, as discussed above, even if the petition is considered as one for a skilled worker, the petitioner's evidence still fails to establish that the beneficiary meets the educational requirement for a bachelor's degree as stated on block #14 of the ETA 750. Therefore, despite the omission in analysis, the director's decision to deny the petition was correct.

On appeal, counsel submits no new evidence. For the reasons discussed above, the assertions of counsel in his brief fail to overcome the decision of the director.

Beyond the decision of the director, other reasons exist to deny the petition.

In his decision, the director did not discuss the petitioner's ability to pay the proffered wage. The evidence in the record does not establish the amount of compensation paid by the petitioner to the beneficiary in 2000, the year of the priority date. For 2001 the beneficiary's IRS W-2 transcript shows income of \$43,000.00 from the petitioner and for 2002 the beneficiary's W-2 Wage and Tax Statement shows income of \$48,000.00 from the petitioner. The compensation paid to the beneficiary in each of those years was less than the proffered wage of \$65,000.00.

The record contains copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 1998, 1999, 2000 and 2001. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Moreover, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. Since the priority date in the instant petition is in November 2000, the petitioner's tax returns for 1998 and 1999 are not directly relevant to the instant petition. For 2000, petitioner's Form 1120S shows ordinary income of \$87,636.00, an amount which is more than the entire proffered wage of \$65,000.00. For the year 2001, the difference between the beneficiary's actual compensation and the proffered wage was \$22,000.00. But the petitioner's ordinary income for 2001 was \$18,697.00, which was \$3,303.00 less than the amount needed to raise the beneficiary's actual compensation to the proffered wage. For the year 2002, the difference between the beneficiary's actual compensation and the proffered wage was \$17,000.00. The petitioner's tax return for 2002 was not submitted for the record, apparently because it was not yet due when the petitioner responded to the second RFE on April 1, 2003. The tax return for the year 2001 was therefore the most current return available as of the date of the director's decision. But that return fails to establish the petitioner's ability to pay the proffered wage to the beneficiary in the year 2001.

Aside from the insufficiency of the evidence to establish the petitioner's ability to pay the proffered wage to the beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence, CIS records indicate that the petitioner has filed nineteen I-140 petitions since 1999. Four of those were filed in 2002 (including the instant petition), two in 2003 and one in 2004. In addition, CIS records show that more than three hundred I-129 petitions have been filed by the petitioner since 1999. Concerning the I-129 petitions, a letter in the record dated April 1, 2003 from the petitioner's president states that the majority of the beneficiaries of the approved I-129 petitions have not yet come to the United States, partly because the petitioner has been awaiting an improvement in the U.S. economy before bringing them onto its staff.

Notwithstanding the explanation of the I-129 petitions offered by the petitioner's president, the record in the instant case contains no information about the proffered wages for the other potential beneficiaries of

petitions filed by the petitioner, nor about the priority dates of any of the other I-140 petitions, nor about the present employment status of other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition, even if the other issues discussed above were resolved favorably to the petitioner.

Another issue not discussed in the director's decision concerns the labor certification in the record. Counsel submitted copies of the labor certification, but no original labor certification was submitted.

The regulations at 8 C.F.R. §§ 204.5(a)(2), (1)(3)(i) require submission of a labor certification. The regulation at 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, *must be submitted in the original* unless previously filed with the Service.

(Emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides:

In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.

(Emphasis added).

Counsel has not cited any authority permitting CIS to accept a photocopy of the ETA 750. Concerning duplicate labor certifications, the regulation at 20 C.F.R. § 656.30(e) states:

Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

In counsel's initial cover letter dated June 20, 2002 accompanying the I-140 petition counsel stated that the original labor certification had been lost or misplaced. In that letter, counsel therefore requested CIS to obtain a copy of the certified Labor Certification from the Department of Labor in California. In his first RFE, quoted above, the director noted that the record contained only a photocopy of the approved labor certification. The director informed the petitioner that since the petitioner had stated that the original ETA 750 had been lost prior to its being submitted to CIS, no responsibility for the lost ETA 750 rested with CIS, and that the petitioner would have to submit a new ETA 750 to the Department of Labor for certification. The director cited no legal authority in support of his position on this point. The director did not mention counsel's request to CIS to obtain a copy of the labor certification from the Department of Labor.

Counsel's response to the first RFE did not reply directly to the director's statements on that point. Rather, counsel submitted an additional photocopy of the previously-submitted ETA 750.

The regulation at 20 C.F.R. § 656.30(e) provides for a process to obtain a duplicate labor certification upon the request of an immigration officer, and no regulation appears to limit the responsibility of CIS to request a duplicate labor certification only to those instances in which the original labor certification was lost after submission to CIS. The director therefore erred in failing to request the Department of Labor for a duplicate labor certification, as requested by the petitioner. Nonetheless, since the petition was correctly denied for the reasons discussed above, correction of that error by obtaining a duplicate labor certification correction of that error would not change the decision to deny the petition.

Should the petitioner wish to submit a new I-140 petition for another beneficiary based on the same labor certification, it would be appropriate at that time, if the original labor certification remains missing, for the petitioner to again request the director to obtain a duplicate copy from the Department of Labor.

For the foregoing reasons, the decision of the director to deny the petition was correct, both for the reasons stated in that decision and for the other reasons discussed above.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.